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Supreme Court, U.S.
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No. 92-1988

In The

Supreme Court of the United States

October Term, 1993

TICOR TITLE INSURANCE COMPANY, *et al.*,

Petitioners,

v.

WALTER THOMAS BROWN AND JEFFREY L. DZIEWIT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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STATEMENT OF THE CASE

Petitioners seek review of the Ninth Circuit Court of Appeals' decision reversing a summary judgment that dismissed this federal treble damage antitrust class action lawsuit brought on behalf of a class of purchasers from the states of Arizona and Wisconsin. The lawsuit charges the Petitioners, comprising six of the nation's largest title insurance companies, with horizontal price fixing of the fees for title search and examination services. The alleged Section 1 Sherman Act violations arise from the same conduct reviewed by this Court last term in *Federal Trade Comm'n. v. Ticor Title Ins. Co.*, 112 S.Ct. 2169 (1992). Review should be denied because the Ninth Circuit's decision is neither inconsistent with any decision of this Court nor in conflict with the decision of any other court of appeals and no novel or substantial issue of law is involved.

The Proceedings

In litigation that commenced in 1980, the defendant title insurers were sued by the United States, the State of Arizona and private class representatives in state and federal courts in Arizona for price fixing of escrow services (distinct from search and examination services). No material issues of fact were presented and defendants sought summary judgment based on immunity from antitrust liability under the doctrine of state action articulated in *Parker v. Brown*, 317 U.S 341 (1943) and the filed tariff doctrine articulated in *Keogh v. Chicago and N.W. Ry. Co.*, 260 U.S. 156 (1922).

Both defenses were rejected by the district court. *United States v. Title Ins. Rating Bureau of Ariz.*, 517 F.Supp. 1053 (D. Ariz. 1981), *aff'd*, 700 F.2d 1247 (9th Cir. 1983), *cert. denied*, 467 U.S. 1240 (1984) (*"TIRBA"*); *In re Ariz. Escrow Fee Antitrust Litig.*, 1981-2 Trade Cases ¶ 64,429. Total settlements of $4.82 million were obtained. *In re Ariz. Escrow Fee Antitrust Litig.*, Civ. No. 80-840A PHX CAM (D. Ari. Sept. 22, 1982).[1]

In 1985 the Federal Trade Commission began an action against the same defendants for price fixing fees for real estate title examination and search services, as distinct from escrow fees. *In re Ticor Title Ins. Co.*, Docket No. 9190, FTC Initial Decision of Administrative Law Judge (December 22, 1986). Twelve private class actions, filed in the wake of the FTC's complaint, were consolidated in the Eastern District of Pennsylvania as MDL 633. *In re Real Estate Title and Settlement Serv. Antitrust Litig.*, 1986-1 Trade Cases (CCH) ¶ 67,149 (E.D. Pa. 1986). The consolidated cases sought, *inter alia*, damages on behalf of consumers who purchased title search and examination and escrow services at fixed prices from the title insurers in those thirteen states. *Id.* None of the private class actions were filed by residents of Arizona or Wisconsin or by anyone damaged by the title insurers' alleged price fixing in Arizona or Wisconsin. *Id.* As in the earlier

[1] The ruling on state action immunity was appealed to the Ninth Circuit, which affirmed the district court's holding that Arizona's title insurance legislation did not reflect a clearly articulated or affirmatively expressed state policy to supplant competition. *TIRBA*, 700 F.2d at 1253.

escrow fee litigation in Arizona, the MDL 633 defendants asserted state action immunity under *Parker*. Shortly after consolidation of the private cases, this Court handed down its decision in *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985). *Id.* at 62,922.

The *Southern Motor Carriers* decision was construed by class counsel as being adverse to all class members' claims. *Id.* at 62,923. Class counsel failed to distinguish between the various state regulatory schemes. *Id.* at 62,932. In early 1986, the MDL 633 class representatives entered into a settlement that provided the class members with no damages and no meaningful equitable relief but did provide for attorneys' fees in the amount of $715,000 to class counsel. *Id.* at 62,924-925, 926 n. 5. Petitioners' counsel have admitted that the settlement obtained by the lawyers for the class only benefitted class counsel. Petitioners' App. 1a-2a.

The class representatives' attorneys in the MDL 633 litigation dropped the damage claims seeking tens of millions of dollars and, instead, agreed to a settlement that provided only equitable relief. The class representatives then sought certification under Rules 23(b)(1) and (b)(2), Fed. R. Civ. P. *Id.* at 62,928. Dropping the damage claims at time of settlement was intended to avoid certification under Rule 23(b)(3) and thereby eliminate the right of objecting class members to opt out. *Id.* at 62,929. The only notice provided to the class was by publication. *See* Petitioners' App. at 41a n. 4.

Attorneys General from Montana, New Jersey, Ohio, Pennsylvania and Wisconsin objected to the settlement because it provided no meaningful relief to the class. *Id.*

at 62,926. Moreover, the Attorneys General pointed out that the effect of the *Southern Motor Carriers* decision varied from state to state. *Id.* at 62,927. (For example, in states where the title insurers' price fixing was not actively supervised by the state, *Southern Motor Carriers* had no impact. *Id.* at 62,932). They also objected because the settlement provided only the class lawyers with any real benefits. *Id.* at 62,931. The Arizona Attorney General attempted to opt out on behalf of the State of Arizona and Arizona consumers, claiming inadequate representation. *Id.* at 62,929.

The MDL 633 court held that none of the class members could opt out because the class had been certified under Rule 23(b)(1) and (b)(2), rather than Rule 23(b)(3). *Id.* It overruled all objections and approved the settlement. It acknowledged that the claims involved tens of millions of dollars of overcharges by the defendants (*Id.* at 62,935), but nevertheless entered a judgment purporting to extinguish these damage claims for all class members, including the absent Arizona and Wisconsin class members. *Id.*

Arizona appealed the refusal to allow absent class members to opt out. The Third Circuit affirmed without opinion. *In re Real Estate Title and Settlement Serv. Antitrust Litig.*, 815 F.2d 695 (3d Cir. 1988), *cert. denied*, 485 U.S. 909 (1988). In a subsequent decision by the Third Circuit in 1989 (vacating an injunction by the MDL 633 court against the Arizona Attorney General who was then seeking damages for the Arizona class members in the Arizona state courts), the Third Circuit observed that the absent Arizona class members in MDL 633 had not been provided with the minimum procedural protections

required by this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) and explained its earlier affirmance without opinion of the MDL 633 judgment as reflecting the right of absent class members to obtain collateral review. *In re Real Estate Title and Settlement Serv. Antitrust Litig.*, 869 F.2d 760, 762-763, 764 n. 1 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989).

Six months after the Third Circuit's 1989 decision in *In re Real Estate Title and Settlement Serv. Antitrust Litig.*, the FTC entered a final order finding that there had been no active state regulation of search and examination rates in either Arizona or Wisconsin and that the defendant title insurers were guilty of price fixing in those states. *In re Ticor Title Ins. Co.*, Docket No. 9190, p. 13-20, FTC Final Order (September 19, 1989). This treble damage suit was filed on the heels of the FTC's Final Order. Following the Third Circuit's reversal of the FTC on grounds of state action immunity, *Ticor Title Ins. Co. v. Federal Trade Comm'n.*, 922 F.2d 1122 (3d Cir. 1991), this Court granted certiorari, reversed the judgment of the Third Circuit, and remanded the case for further proceedings consistent with the Court's conclusion that the Petitioners were not entitled to state action immunity in Wisconsin and might not be entitled to such immunity in Arizona. *Federal Trade Comm'n. v. Ticor Title Ins. Co.*, 112 S.Ct. 2167, 2176 (1992).

REASONS FOR DENYING THE WRIT

The questions on which review is sought involve no conflict with any decision of this Court or of any other

Court of Appeals. The decision below properly applies well-established constitutional principles of minimal due process announced by this Court in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) and *Philips Petroleum Co. v. Shutts*, 472 U.S. 798 (1985). In this case, substantial damage claims were foreclosed without notice to or opportunity for absent plaintiffs to remove themselves from the class litigation. With respect to the other two purported errors, the decision below correctly reaffirms earlier decisions in prior litigation against the same defendants over eleven years ago.

I. NO NEW CONSTITUTIONAL QUESTION IS PRESENTED BY THE RECORD AND THE DECISION BELOW IS CLEARLY IN ACCORD WITH THE DECISIONS OF THIS COURT.

Petitioners ask this Court to review whether an absent plaintiff is bound under the doctrine of *res judicata* by the settlement of a federal class action lawsuit in which substantial damage claims were foreclosed, where he received no notice of the lawsuit, had no opportunity to remove himself from the litigation, did not know who the lawyers were, and was not told about the settlement.

That issue was laid to rest in *Shutts* and review is therefore not warranted. *Shutts* holds that absent plaintiffs must receive proper notice:

> If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, [footnote omitted] it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel.

472 U.S. at 811-812. To satisfy due process, the notice to absent plaintiffs must not only contain the needed informaiton; it must be sent by means reasonably calculated to reach the intended addressee. *Mullane*, 339 U.S. at 314-315. Absent special circumstances (not present here), notice by publication is inadequate. *Id.* at 319-320. As stated in *Shutts*, only:

> a fully descriptive notice . . . sent first-class mail to each class member, with an explanation of the right to "opt out," satisfies due process.

472 U.S. at 812.

Defendants failed to provide the notice required by *Mullane* and *Shutts*. No reasons have been advanced to explain this want of notice. There having been no adequate notice, the Court of Appeals correctly held that the absent plaintiffs were not accorded minimal due process.

The requirement of notice to the absent plaintiff gives him the right to take a meaningful part in the case, including the right to remove himself from it. In *Shutts*, this Court held:

> Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court.

Id.

Petitioners' contention that the *Shutts* requirement of according absent plaintiffs the right to opt out does not

apply in *federal* class actions is without merit. *Shutts* itself makes clear that the same constitutional principles apply in a federal forum. *Id.* at 812-815. Thus, in rejecting the Petitioners' contention there that an opt-in procedure was required by the due process clause and concluding that an opt-out procedure was constitutionally permissible, this Court pointed out that an opt-in requirement "would require the invalidation of scores of state statutes *and of the class action provision of the Federal Rules of Civil Procedure. . . .* " *Id.* at 813 (emphasis added). Clearly this Court intended that the same due process considerations would apply to federal as to state actions.[2]

Petitioners' extended discussion of nationwide federal jurisdiction in antitrust cases is inexplicable. The court in *Shutts* did not distinguish between absent *resident* class members and absent *non-resident* class members; the distinction was between absent *plaintiffs* and absent *defendants*. *Shutts* dealt with the question of notice to all absent class members, calling for no different treatment of residents than non-residents. As explained in *Shutts*, while the contacts a defendant has with the forum state impact upon the extent to which jurisdiction may be exercised over him, such contacts are irrelevant regarding plaintiffs. Moreover, even defendants *with* minimum contacts are entitled to notice. If jurisdiction over absent Plaintiffs required *minimum* contacts (as the petitioner in

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[2] The due process guarantees of the Fourteenth and Fifth Amendments are essentially the same. *See In re Real Estate Title and Settlement Serv. Antitrust Litig.*, 869 F.2d 760, 766 n. 6 (3d Cir. 1989).

Shutts argues unsuccessfully), that would be in addition to notice, not in place of notice.[3]

While this Court confined its ruling in *Shutts* to cases in which the relief sought was wholly or predominantly damages, MDL 633 was such a case. Both the Third Circuit (on direct review) and the Ninth Circuit (on collateral review) concluded that MDL 633 "involved the *foreclosure of substantial damage claims.*" *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *pet. for cert. filed* (June 15, 1993); Petitioners' App. at 12a (emphasis in original); *In re Real Estate Title and Settlement Serv. Antitrust Litig.*, 869 F.2d 760, 768 (3d Cir. 1989).[4] It follows that the absent

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[3] *Shutts* also cannot be distinguished by the fact that this action proceeds under a federal claim rather than under state law in diversity. The exercise of personal jurisdiction in a federal question case depends on whether a rule or statute potentially confers jurisdiction. *See Go-Video Inc. v. Akai Elec. Co., Ltd.*, 885 F.2d 1406, 1413-1415 (9th Cir. 1989). Absent a special statute providing for nationwide service of process, the Fourteenth Amendment "minimum contacts" standard applies. *See supra* p. 8 n. 2. Section 12 of the Clayton Act, 15 U.S.C. § 22, only provides for extended jurisdiction and nationwide service of process on *corporate* defendants.

[4] The Ninth Circuit, recognizing the "hybrid" nature of MDL 633, accorded *res judicata* effect to the injunctive aspect of that case (which does not require notice) and rejected *res judicata* treatment for the damage claims (which does require notice). *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *pet. for*

Arizona and Wisconsin plaintiffs were entitled to the opportunity to opt-out before being bound by a settlement that foreclosed those claims.[5]

II. PETITIONERS' "STATE ACTION" AND "FILED TARIFF" ARGUMENTS ARE FRIVOLOUS.

A. State Action Immunity

While none of the defendants raised state action as a basis for summary judgment in the district court, that court relied upon state action as an alternate ground for its judgment dismissing the case. Accordingly, it was proper for the Court of Appeals to address the issue. The decision of the Court of Appeals on state action is fully consistent with its own earlier decision in *TIRBA* and with the precedents of this Court.

The test for state action immunity has two prongs: (1) actions alleged to be violations of the antitrust laws must

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cert. filed (June 15, 1993); Petitioners' App. at 12a (emphasis in original).

[5] If the MDL 633 Court intended to bind the settling plaintiffs with regard to claims for money judgments, as the Third and Ninth Circuits concluded, the failure to provide absent class members as opportunity to opt-out was a denial of due process under *Shutts*. 472 U.S. at 812. If, on the other hand, MDL 633 was properly certified under Rules 23(b) (1) and (b) (2) because the damage claims were dropped, then the judgment in that case could have no *res judicata* effect concerning claims wholly or predominantly for money damages. The doctrine of *res judicata* does not apply to issues that could not have been raised in the prior action. *Federal Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981).

be taken pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation and (2) there must be active state regulation. *See California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). The proof needed to establish a state policy to displace competition is proof that the legislature (1) authorized the challenged conduct and (2) intended to displace competition with regulation. *Traweek v. City and County of San Francisco*, 920 F.2d 589, 591 n. 1 (9th Cir. 1990). It is beyond dispute that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it. . . . " *Parker*, 317 U.S. at 351. Private parties obtain immunity only if the State acting as sovereign intends to displace competition. If Petitioners' position were correct, state legislatures could simply repeal the federal antitrust laws by authorizing antitrust violations (without providing any regulatory substitute), turning *Parker* on its head. As this Court explained in *Federal Trade Comm'n. v. Ticor Title Ins. Co.*, "a State may not confer antitrust immunity on private persons, . . . " although "it may displace competition with active state supervision if the displacement is both intended by the State and implemented in its specific details." 112 S.Ct. at 2176.[6]

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[6] Although the Ninth Circuit did not rely upon collateral estoppel in deciding the state action issue, that doctrine provides yet another basis for its decision. The immunity in Arizona of five of the six petitioners was litigated and decided some eleven years ago in litigation involving the same Arizona legislation:

> [T]he Arizona Legislature did not intend to replace competition with public regulation of escrow rates. . . . [T]he Court concludes that the defendants

Respondents also contended below that the Wisconsin regulatory scheme failed to satisfy the first prong of the *Midcal* test. The Ninth Circuit did not address this contention in view of this Court's decision in *Federal Trade Comm'n. v. Ticor Title Ins. Co.* that there was no active supervision of rate making in Wisconsin. Given that Wisconsin failed to satisfy the second prong, it was unnecessary in the Ninth Circuit's view to address whether it satisfied the first prong. In light of that decision of this Court, the Ninth Circuit's reversal of the district court's grant of summary judgment on grounds of state action immunity clearly was correct.[7]

B. Filed Tariff Doctrine

Keogh v. Chicago and N.W. Ry. Co., 260 U.S. 156 (1922), has no bearing on this case. As this Court made clear in *Square D Co. v. Niagra Frontier Tariff Bureau*, 476 U.S. 409,

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may not successfully interpose the state action defense.

TIRBA, 700 F.2d at 1253. This issue, having been actually and necessarily determined in 1981, is conclusive in this case. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

[7] Petitioners' argument under Section 16(a) of the Clayton Act (Petition for Certiorari at 25) is misplaced. It confuses collateral estoppel and *stare decisis*. Furthermore, it ignores the fact that the instant petition arises from the granting of a motion for summary judgment on a record comprised essentially of the same record developed by the FTC. In view of the fact that the record reviewed by the Ninth Circuit in this case was therefore virtually identical to that reviewed by this Court in *Federal Trade Comm'n. v. Ticor Title Ins. Co.*, there is no basis for alleging the Ninth Circuit erred in following this Court's opinion.

420 (1986), the *Keogh* doctrine was an "interpretation of the [Interstate Commerce Act] statutory scheme. . . ." This Court has not applied the *Keogh* doctrine to various other federal statutory schemes. For example, in *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 215, *as amended*, 383 U.S. 932 (1966), this Court refused to apply *Keogh* to the Federal Maritime Act because "the Shipping Act gives the Federal Maritime Commission far more limited authority over rates than the Interstate Commerce Act gives the ICC." *Square D Co.*, 476 U.S. at 422 n. 29, citing *Carnation*, 383 U.S. at 215.

This case involves a state regulatory scheme that does not resemble the pervasive regulation involved in *Keogh*. The Arizona and Wisconsin statutes, unlike the Interstate Commerce Act, fail to provide for affirmative governmental authority, permit automatic enactment of rates unless disapproved, do not require that rates be subject to public notice, comment and hearings, and do not involve active supervision. This type of passive regulatory scheme has never been found to preclude the treble damage remedy of the Sherman Act. *See Wileman Brothers and Elliott, Inc. v. Giannini*, 909 F.2d 332, 337-338 (9th Cir. 1990); *City of Long Beach v. Standard Oil Co.*, 872 F.2d 1401, 1409 (9th Cir. 1989).[8]

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[8] With respect to Arizona, the *Keogh* defense may not be available to five of the six Petitioners because the Arizona district court in *TIRBA*, reviewing the same regulatory scheme in litigation involving the same defendants, rejected the defense, stating "the regulation . . . is not of the scope that would preclude judicial scrutiny." *In re Ariz. Escrow Fee Antitrust Litig.*, 1981-2 Trade Cases (CCH) ¶ 64,429, 75,102 (D. Ariz. 1981).

CONCLUSION

There was no error in the Court of Appeals' decision, and further review by this Court is not warranted. Respondents respectfully submit that the writ of certiorari should be denied.

Respectfully submitted,

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Although the district court's 1981 *Keogh* ruling was subsequently vacated when the case was settled, that does not necessarily rob the ruling of collateral estoppel effect. *See Bates v. Union Oil Co. of Calif.*, 944 F.2d 647, 650 (9th Cir. 1991).

APPENDIX

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Affidavit of Gary P. Brady, dated January 30, 1990;
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AFFIDAVIT

STATE OF MASSACHUSETTS)
) ss.
County of Suffolk)

GARY P. BRADY, first being duly sworn and upon his oath, states as follows:

1. I am a member of the Bar of the State of Arizona. This affidavit is based on my own personal knowledge.

2. From August 1983 to May 1988, I was employed by the Arizona Attorney General with the Antitrust Division of that office. In that capacity, I represented Tucson Unified School District and Phoenix Elementary No. 1 School District and the State of Arizona in that litigation known as *In re Real Estate Title Insurance and Settlement Services Antitrust Litigation*, MDL 633 (E.D. PA) and in *Tucson Unified School District and Phoenix Elementary School District No. 1 v. Chicago Title Insurance Co., et al.* (Pima County Superior Court No. 246527).

3. Shortly after the District Court in Pennsylvania denied opt outs and entered judgment in MDL 633, I asked counsel for the class representatives why they made no effort to assert a claim for damages based on Arizona's antitrust law, thereby avoiding any state action immunity problems. The response was that because the class representatives' counsel were so accustomed to litigation under federal statutes, no consideration at all was given to whether there was an action based on Arizona antitrust law. In this case, the class representatives never tries to assert a claim based on Arizona law and never even though about doing so.

5. On September 19, 1985, after the district court approved the settlement, counsel for the defendants met with Bob Corbin, Arizona Attorney General, at his office in Phoenix, Arizona. I was present at that meeting. During the meeting, defendants' counsel admitted that the class representatives' lawyers were the only real gainers in the settlement of MDL 633.

6. Counsel for the class representatives admitted to me that at the time the settlement was approved and until I brought it to their attention, the class representatives did not know about the district court decision in *In re Arizona Escrow Fee Antitrust Litigation*, 1981-2 Trade Cas. (CCH) ¶ 64,429 (D. Ariz. 1981) wherein the court held that the *Keogh* doctrine did not apply.

/s/ Gary P. Brady
GARY P. BRADY

SUBSCRIBED AND SWORN to before me this 30th day of January, 1990.

/s/ Marie Giannino
Notary Public

My Commission Expires:
10/19/95